Katten
Katten Muchin Rosenman LLP

EMPLOYMENT LAW UPDATE

AUGUST 2010

Recently, in *Sandra Bogota, et al. v. The University Club, et al.* (Sup. Ct. N.Y. County July 3, 2010), the New York State Supreme Court once again emphasized that it is critical for employers to provide sexual harassment and anti-discrimination training that educates their employees about unlawful discriminatory conduct in a meaningful way. The Court's decision underscores that perfunctory training and policies will not shield an employer from liability for the discriminatory actions of its employees under New York City law.

In *Bogota*, the plaintiffs, six female banquet servers working at The University Club, alleged that during their employment, they were subjected to sexual harassment (including sexual molestation and unwanted sexual propositions) by their supervisor, the banquet captain. The plaintiffs further alleged that the supervisor's acts of sexual harassment occurred over several years, and that acceding to his sexual advances would have enabled them to obtain better work assignments and perhaps promotions. As for the supervisor, he contended that the allegations against him were either false or related to consensual sexual conduct.

In their lawsuit, the plaintiffs filed claims of hostile work environment based on sexual harassment and quid pro quo harassment under New York City law against The University Club and their supervisor, as well as claims for assault and battery against their supervisor, negligent retention of the supervisor and retaliation (claiming that it spread rumors that they were prostitutes) against The University Club.

After the parties engaged in a lengthy discovery period, The University Club filed a motion for summary judgment on the grounds that the plaintiffs failed to establish the prima facie elements of their claims and/or that it had affirmative defenses to such claims. Specifically, The University Club maintained that it "prohibited sexual harassment and had established a meaningful complaint process, that none of the plaintiffs ever explicitly complained about sexual harassment, and when plaintiff Bogota did complain, [it] took prompt corrective action, including pulling [the supervisor] from the job."

In denying The University Club's motion for summary judgment, the New York State Supreme Court held, among other things, that under New York City law:

* An employer will be liable for discriminatory acts (1) of its employees and agents who exercise managerial or supervisory responsibility, or (2) when the employer knew or should have known of discriminatory conduct by an employee and acquiesced, failed to take immediate and appropriate corrective action or failed to exercise reasonable diligence to prevent the conduct;

* Where the employer's potential liability is based solely on the discriminatory conduct of its supervisory employee, the employer may mitigate or avoid any civil or punitive damages that may be imposed by pleading and proving that, prior to the conduct, **"it had established and complied with policies, programs, and procedures to prevent and detect unlawful discriminatory practices by employees, including a meaningful and responsive investigative procedure and procedures for taking appropriate action; it had a firm policy communicated to employees indicating that the company is against such practices and it had a program to educate employees and agents about unlawful discriminatory practices, and had procedures for supervision and oversight of employees directed at prevention and detection and, as well, that it had a record of no or few prior incidents of discriminatory conduct by the employee."** (emphasis added). In addition, when the employer's liability is based solely on the fact that it should have known of the discriminatory conduct and failed to take steps to prevent such conduct, the employer may avoid liability by pleading and proving any or all of the factors listed above; and

* Although The University Club demonstrated that it provided training and maintained a policy against discrimination, it could not supply evidence to demonstrate that the plaintiffs attended any training session or received the policy. Indeed, The University Club did not supply attendance sheets with respect to its training or any other documentation.

In fact, despite its assertion that it maintained "a no-tolerance policy toward employee harassment," The University Club was only able to demonstrate that it held training in or about 1999 and 2005. Moreover, it issued anti-harassment policies in 2001 and 2005.

As set forth above, the *Bogota* Court clearly resounded that employers must take seriously their obligations to educate their employees about their "rights and procedures to follow" with respect to sexual harassment and discrimination in the workplace. At a minimum, the Court in *Bogota* directs that every employer should provide its workforce (including supervisors and non-supervisory employees) with an appropriate policy against discrimination, which includes clear procedures for reporting such conduct, and thoughtful training that leaves the employees with an understanding of the issues presented in these difficult situations and the process that they may undertake to resolve them.

In another recent decision, *Malika Henry v. Turner Construction Company*, Case No. 09-Civ. 9366 (S.D.N.Y. June 14, 2010), the United States District Court for the Southern District of New York granted Turner Construction's motion to compel arbitration of the plaintiff's race discrimination claims under federal law pursuant to an agreement to arbitrate between the parties. In its decision, the Court held that Turner Construction had not waived its right to arbitrate the race claims by previously participating in proceedings before the U.S. Equal Employment Opportunity Commission because, among other things, Turner Construction "explicitly told the EEOC that 'participation in EEOC mediation shall not be considered as a waiver ... of Turner's right to compel arbitration.' Although the EEOC informed Henry that she has the right to file a lawsuit against Turner within ninety days of dismissal of her charge, this right is subject to the arbitration agreement."

If you have any questions regarding the foregoing or would like to receive copies of any of the cases referenced herein, please contact:

Sharon Parella
212.940.6352
sharon.parella@kattenlaw.com

Tiffany Ma
212.940.6550
tiffany.ma@kattenlaw.com